Emilia Shipping Inc v State Enterprise for Pulp and Paper Industries

HIGH COURT (SINGAPORE) — ADMIRALTY IN PERSONAM NO 653 OF 1990
CHAN SEK KEONG J
1 MARCH 1991

Shipping and Navigation — Bills of lading — Right of shipowner to on-carry cargo to another port — Right of shipowner to enforce claim for freight — Order for sale of cargo — Rules of the Supreme Court 1970, O 29 r 4

Shipping and Navigation — Admiralty jurisdiction — In personam action — Cargo within the jurisdiction — Order for sale of cargo to enforce shipowner's claim for freight — Supreme Court of Judicature Act (Cap 322, 1985 Ed), s 16 — High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed), s 4(8)

Civil Procedure — Admiralty — Jurisdiction — Conditional appearance — Bases of jurisdiction — Abuse of process — Power of court to order sale of movable property which is subject matter of plaintiffs' claim — Rules of the Supreme Court 1970, O 29 r 4 — Supreme Court of Judicature Act (Cap 322, 1985 Ed), s 16 — High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed), s 4(8)

The defendants were owners of a cargo of wood pulp carried under bills of lading on board the plaintiffs' vessel. At the time when the cargo of wood pulp was loaded on board the plaintiffs' vessel, the vessel was time chartered to Meridien Shipping Incorporated. The cargo of wood pulp was to be delivered to the defendants at the Iraqi port of Um Qaser or Basrah. After the time charterer ran into financial difficulties and repudiated the charterparty, the plaintiffs took over the running of the vessel including the contracts of carriage entered into by the vessel during the currency of the charterparty. As the vessel was about to proceed to discharge the defendants' cargo at Um Qaser/Basrah, Iraq invaded Kuwait. Imposition of economic sanctions against Iraq made it difficult and illegal for the plaintiffs' vessel to proceed to any Iraqi port. It was illegal for the plaintiffs' vessel — a Panamanian registered vessel — to proceed to any Iraqi port as the government of Panama had issued a directive implementing the United Nations Security Council Resolution which imposed economic sanctions on Iraq. After making inquiries in 14 countries as to the possible discharge of the cargo of wood pulp in those countries, the plaintiffs carried the cargo to Singapore.

At Singapore, the cargo was discharged into a warehouse and thereafter, the plaintiffs commenced an action against the defendants for freight arising from the carriage and on-carriage of the cargo. The plaintiffs obtained leave to serve the writ out of the jurisdiction on the defendants. The plaintiffs also applied ex parte for an order to sell the cargo of wood pulp. Subsequently, the defendants entered conditional appearance in the plaintiffs' action and applied to stay the ex parte order for the sale of the cargo. Having obtained this order defendants therefore applied to set aside the plaintiffs' action and the orders of court giving leave to the plaintiffs to serve the writ out of the jurisdiction and the ex parte order for sale of the cargo.

In this application to set aside the plaintiffs' action and the orders of the court, the defendants contended that the court had no admiralty in personam jurisdiction as the defendants did not have a place of business in Singapore and the defendants were not habitually resident in Singapore. Alternatively, the defendants contended that the plaintiffs had abused the process of the court by deliberately bringing the cargo of wood pulp to Singapore for the sole purpose of obtaining jurisdiction over the defendants. Additionally, the defendants contended that, in the circumstances of the case, the court should not order a sale of the cargo of wood pulp.

Held, dismissing the defendants' application:

(1) The High Court has jurisdiction to try the plaintiffs' action as the cargo of wood pulp was within the jurisdiction of the court. Section 16(1)(b) of the Supreme Court of Judicature Act (Cap 322, 1985 Ed) clearly covers the case of the defendant or defendants having property in Singapore.

(2) In so far as s 4(8) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed) suggests that the admiralty in personam jurisdiction may only be invoked against a defendant who is habitually resident or has a place of business in Singapore, it is inconsistent with s 16 of the Supreme Court of Judicature Act and the latter provision is to prevail as it has radically enlarged the bases of the High Court's jurisdiction.

(3) The plaintiffs' action in on-carrying the cargo to Singapore was not an abuse of the court's process.

(4) Given the mounting heavy storage and other charges and the process of deterioration to which the cargo of wood pulp was exposed, it was an appropriate case for the court to order the sale of the cargo. As the cargo was the subject matter of the plaintiffs' claim, the court has power under O 29 r 4 of the Rules of the Supreme Court 1970 to order a sale of the cargo.

[*Editorial Note*: The plaintiffs arrested the cargo of wood pulp in an admiralty in rem action. The defendants applied to, inter alia, set aside the arrest of the cargo and succeeded in their application. See *'The Ocean Jade'* at p 385.]

Cases referred to

1 *Mary Seward* v *Owner of 'Vera Crux'* (1884) 10 AC 59 (refd)
2 *Blackpool Corp* v *Starr Estate* [1922] 1 AC 27 (refd)
3 *Baker* v *Edgar* [1898] AC 748 (refd)
4 *'The August 8th'* [1983] MLJ 281 (refd)
5 *'The O Sambaur' (No 1)* [1958] MLJ 281 (refd)
6 *Stein* v *Valkenhuysen* (1858) 120 ER 431 (refd)
7 *Watkins* v *North American Land & Timber Co Ltd* (1904) 20 TLR 534 (refd)
8 *Colt Industries Inc* v *Sarlie* [1966] 1 All ER 673 (refd)
9 *Baldry* v *Jackson* [1976] 1 NSWLR 18 (refd)
10 *Carrick* v *Hancock* (1895) 12 TLR 59 (refd)
11 *Loke Wan Tho* v *Macdonald* [1949] MLJ 293 (refd)
12 *Ewing* v *Orr Ewing* (1884) 9 AC 34 (refd)
13 *The Thames Iron Works Co* v *The Patent Derrick Co* (1860) 70 ER 676 (distd)
14 *Soames* v *British Empire Shipping Co* (1860) 11 ER 459 (distd)
15 *Bruce* v *Everson* (1883) Cab & El 18 (distd)
16 *Dangar* v *Gospel Oak Iron Oak Co* (1860) 6 TLR 260 (folld)

Legislation referred to

High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed) s 4(8)
Supreme Court of Judicature Act (Cap 322, 1985 Ed) s 16
Rules of the Supreme Court 1970 O 2, O 29 r 4

Ajaib Haridass for the plaintiffs.
Sin Lye Kuen for the defendants.

Cur Adv Vult

Chan Sek Keong J: The defendants, who are an Iraqi state organization with no place of business in Singapore, have applied to set aside this action and also two ex parte orders of court, inter alia, on the ground that the High Court has no jurisdiction in the matter.

The plaintiffs are the owners of the vessel 'Ocean Jade'. The vessel was by a charterparty dated 17 May 1990 let out to Meridian Shipping Inc ('Meridian'), a US corporation, for a single charter from the US Gulf to the Red Sea and the Persian Gulf. Among the goods loaded on the vessel was a cargo of bleached and unbleached wood pulp ('the cargo') for which a prepaid bill of lading was issued by Meridian to the order of the Rafidain Bank, Baghdad, as the consignee and the defendants as the notifying party. Meridian ran into financial difficulties and repudiated the charterparty on 6 July 1990 after failing to pay one instalment of charterhire. Meridian is now under Chapter 11 protection.

The plaintiffs terminated the charterparty on 9 July 1990 and took over the running of the vessel which was then at Suez en route to the Persian Gulf. She discharged cargo at Aqaba, Abu Dhabi, Bahrain and Damman. After the discharge at Damman, she was about to proceed to Um Qaser/Basrah to discharge the cargo when Iraq invaded Kuwait on 2 August 1990. On the same day, the Security Council of the United Nations passed a resolution (No 660) condemning the invasion and calling upon Iraq to withdraw from Kuwait immediately and unconditionally. On 7 August 1990, the Security Council reaffirmed Resolution 660 and voted to impose economic sanctions against Iraq. The relevant portions of the Security Council's resolution (No 661), for the purpose of this action, are as follows:

> 3 decides that all states shall prevent:
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> ...
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> ...
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> c the sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for medical purposes and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait or to any person or body for the purposes of any business carried on in or operated from Iraq or Kuwait, and any activities by their nationals or in their territories which promote or are calculated to promote such sale, or supply or use of such commodities or products;
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> 4 decides that all states shall not make available to the government of Iraq or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait, except payments exclusively for strictly medical or humanitarian purposes, and, in humanitarian circumstances, foodstuffs;
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> 5 calls upon all states, including non-members of the United Nations, to act strictly in accordance with the provisions of this resolution notwithstanding any contract entered into or licence granted before the date of this resolution.

On the same day, the United States also imposed a naval blockade of Iraqi ports in order to implement the Security Council resolution.

On 9 August 1990, the plaintiffs' English solicitors telexed the defendants and the Rafidain Bank that because of the situation in the Gulf which might expose the vessel and the cargo to damage or seizure or hostile action, and also that it would be illegal for the plaintiffs to take the cargo to its destination, the vessel would not proceed to Um Qaser or Basrah but to another safe and convenient port. On 13 August 1990, the defendants telexed their reply that the cargo should be discharged at Aqaba to the new named beneficiary. On 14 August 1990, the solicitors replied that the plaintiffs could not agree because it was illegal and might risk confiscation of the vessel and the cargo plus criminal proceedings against the plaintiffs and the crew. On 16 August 1990, the defendants replied and suggested the cargo be discharged, if possible at Aqaba, or at Tunis or in Libya. The defendants repeated their requests many times on the days following but on 20 August 1990, the plaintiffs' solicitors again rejected these requests. On 28 August 1990, the solicitors informed the defendants that the cargo had been discharged in Singapore.

There is affidavit evidence in these proceedings that the government of Panama issued a directive on 9 August 1990 implementing the Security Council resolution No 661. It would appear that the plaintiffs' decision to reject the defendants many requests was based primarily on this directive as the vessel was then flying the Panamanian flag. There is also affidavit evidence before me that the plaintiffs' decision to discharge the cargo in Singapore was made as a result of advice given by their English solicitors, after they had made inquiries in 14 countries, viz India, Pakistan, Singapore, Bangladesh, United Arab Emirates, Egypt, Cyprus, Greece, Thailand, South Africa, Malta, Mozambique, Tanzania and Sudan, on the facilities in these countries with respect to the discharge, storage and protection of the cargo and also the applicable laws relating to bills of lading, liens and the storage and sale of cargo. The plaintiffs were advised that 'only Singapore offered reliable and secure discharge and storage facilities at a reasonable cost, free of exchange control, and a legal environment which would fairly and independently enforce both parties' rights within a reasonable time.' The vessel was accordingly ordered to Singapore where it discharged the cargo on 20 August 1990. It has since been

stored in a PSA warehouse for which storage charges are running at about $50,000 a month.

On 27 August 1990, the plaintiffs commenced an Admiralty Action in Rem No 442/90 against the owners of the cargo. The claim was for freight, back freight and expenses incurred in connection therewith. The claim for freight was made even though the bill of lading was expressed to be prepaid on the ground that the bill was issued even before the cargo was loaded which, the plaintiffs have alleged, Meridian had no power to do. The other claims were made under the terms of the bill of lading and for storage charges but do not require any decision in this application. These claims are disputed.

On 29 August 1990, the cargo was arrested. On 5 October 1990, the plaintiffs obtained judgment in default for US$1,258,409.73. On 8 October 1990, and 15 October 1990, the Sheriff advertised the sale of the cargo. On 23 October 1990, the defendants objected to the sale of the cargo. On 25 October 1990, the Sheriff advised that there were 11 bids for the cargo and the two highest bids were $5,456,000 and $5,400,000. The defendants continued to object to the sale but refused to provide security. On 13 November 1990, the defendants applied to court to set aside the order of arrest on the ground that the High Court had no admiralty in rem jurisdiction in respect of claims for freight against cargo. Judgment has been reserved on this application. [The judgment of Karthigesu J has been delivered. See *'The Ocean Jade'* at p 385.]

To provide for any adverse eventuality, the plaintiffs obtained leave to commence the present action on 13 November 1990 and to serve the writ out of the jurisdiction. The defendants' solicitors did not respond to the plaintiffs' solicitors' request to accept service. On 16 November 1990, the plaintiffs applied ex parte and on 17 November 1990 obtained, inter alia, an order to sell the cargo to the bidder for $5,456,000. On 20 November 1990, the defendants entered conditional appearance and applied to court to stay the ex parte order of 17 November 1990. The application was granted on 27 November 1990, pending the present application of the defendants made on 22 November 1990 to set aside the action and the orders of court of 13 November 1990 and 17 November 1990. There is also before me an application by the plaintiffs to set aside the stay of execution.

Jurisdiction

The primary ground of the defendants' application to set aside the present action is that the High Court has no jurisdiction in the matter. The argument is based on s 4(8) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed). Section 4 of Cap 123 provides as follows:

> (1) Subject to section 5, the admiralty jurisdiction of the Court may in all cases be invoked by an action in personam.
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> (2) The admiralty jurisdiction of the Court may in the cases mentioned in section 3(1)(a) to (c) and (r) be invoked by an action in rem against the ship or property in question.
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> (3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, the admiralty jurisdiction of the Court may be invoked by an action in rem against that ship, aircraft or property.
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> (4) In the case of any such claim as is mentioned in section 3(1)(d) to (q), being a claim arising in connection with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of the action arose, the owner or charterer of, or in possession or in control of, the ship, the admiralty jurisdiction of the Court may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against —
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> (a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or
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> (b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid.
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> (5) In the case of a claim in the nature of towage or pilotage in respect of an aircraft, the admiralty jurisdiction of the Court may be invoked by an action in rem against that aircraft if at the time when the action is brought it is beneficially owned by the person who would be liable on the claim in an action in personam.
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> (6) Notwithstanding anything in subsections (1) to (5), the admiralty jurisdiction of the Court shall not be invoked by an action in rem in the case of any such claim as is mentioned in section 3(1)(n) unless the claim relates wholly or partly to wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages).
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> (7) Where, in the exercise of its admiralty jurisdiction, the Court orders any ship, aircraft or other property to be sold, the Court shall have jurisdiction to hear and determine any question arising as to the title to the proceeds of sale.
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> (8) In determining for the purposes of subsections (4) and (5) whether a person would be liable on a claim in an action in personam, it shall be assumed that he has his habitual residence or a place of business within Singapore.

It is submitted that s 4(8) implies that the admiralty in personam jurisdiction may only be invoked against a defendant who is habitually resident or has a place of business in Singapore, as otherwise s 4(8) would not have provided a statutory assumption in order to found jurisdiction for the purpose of sub-ss (4) and (5). As the defendants do not have a place of business, the court therefore has no jurisdiction. In reply to the submission of counsel for the plaintiffs that the court has jurisdiction by virtue of s 16(1)(b) of the Supreme Court of Judicature Act (Cap 322, 1985 Ed) counsel for the defendants contends that Cap 123 is specific legislation which must prevail against Cap 322 which is general legislation. Section 16(1)(b) provides as follows:

> The High Court shall have jurisdiction to try all civil proceedings where ... (b) the defendant or one of several

defendants resides or has his place of business or has property in Singapore;

This provision has to be read with s 17(b) which provides as follows:

17 Subject to and without prejudice to the generality of section 16, the civil jurisdiction of the High Court shall include —

(b) jurisdiction under any written law relating to matters of admiralty.

In my view, whatever may be the admiralty jurisdiction of the High Court in England, s 17 of Cap 322 expressly states that the *civil* jurisdiction of the High Court shall include each of the *specific* jurisdictions relating to the matters enumerated therein. Matters of admiralty is one of these specific matters. When Cap 322 was re-enacted by Parliament in 1969 (to replace the Malaysian Supreme Court of Judicature Act which was applied to Singapore in 1964), the written law relating to admiralty jurisdiction was Cap 123 which was enacted in 1961. The effect of s 16(1)(b) was to change the entire basis of the general civil jurisdiction of the High Court. Such a change might have affected the basis of each of the jurisdictions specified in s 17, which is expressed to be *subject to* s 16. The question therefore is whether, reading s 16 with the relevant provisions of Cap 123, the basis of the admiralty jurisdiction of the High Court was affected by the changes in 1964.

On this question, counsel for the defendants has argued Cap 123 prevails over Cap 322 if there is any overlapping or inconsistency between them. He has referred to the following authorities: *Mary Seward* v *Owner of 'Vera Crux'*;[1] *Blackpool Corp* v *Starr Estate*;[2] *Baker* v *Edgar*.[3] I do not propose to examine these cases. The principle is well established. In the *Blackpool Corp* case,[2] Lord Haldane said (at p 34):

... we are bound, in construing the general language of the Act ..., to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the legislature had before provided for individually, unless an intention to do so is specially declared. A merely general rule is not enough, even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind I have referred to. An intention to deal with them may, of course, be manifested, but the presumption is that language which is in its character only general refers to subject matter appropriate to class as distinguished from individual treatment. Individual rights arising out of individual treatment are presumed not to have been intended to be interfered with unless the contrary is clearly manifest.

Similarly, in the *Vera Crux* case,[1] Earl of Selborne LC (at p 68) said:

Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.

In my view, the jurisdictional basis of the admiralty jurisdiction of the High Court, in so far as it relates to in personam actions, has been radically affected by s 16 of Cap 322 for a number of reasons. Prior to the application to Singapore of the Malaysian Act, the general civil jurisdiction of the High Court was provided by Cap 3 (1955 Ed) under which its civil jurisdiction was expressed as, inter alia, that of the Chancery and Queen's Bench Divisions of the High Court of Justice in England. The basis of the general civil jurisdiction of the High Court in relation to in personam actions was then, like the High Court of Justice in England, based on territorial dominion. The same basis applied to admiralty actions in personam. When Cap 322 repealed Cap 3 (1955 Ed) in 1969, s 16 provided entirely different bases of jurisdiction, one of which was the presence of the defendant's property within the jurisdiction. The civil jurisdiction of the High Court became limited as such. To the extent that s 16 has enlarged the bases of jurisdiction, it is also inconsistent with s 4(8) which was enacted in that form on the principle of territorial dominion in that the defendant be habitually resident in Singapore or have a place of business in Singapore. Section 16 confers jurisdiction on different principles. As s 17(b) is expressed to be subject to s 16, to the extent that the jurisdictional bases have changed, s 4(8) of Cap 123 must be construed in the context of such change. In other words, the implication of habitual residence or the presence of a place of business was no longer appropriate as it would be inconsistent with the intention of s 16 of Cap 322.

In substance, an admiralty action in personam is an ordinary civil action. Only the subject matter in respect of which the action is brought is different. Like any other civil action, it is subject to the Rules of the Supreme Court 1970. In *'The August 8th'*,[4] the Privy Council held that O 14 was applicable to admiralty actions in rem. A fortiori O 14 applies to such actions in personam. In *'The O Sambaur' (No 1)*[5] Whyatt CJ said (at p 86): '... the code of procedure governing admiralty suits consists partly of the Admiralty Procedure Rules and partly the Rules of the Supreme Court. It must be construed as a whole ...'

Only admiralty actions in rem and in personam action arising out of a collision of ships (in respect of which specific statutory provisions were made even when the basis of the court's jurisdiction was territorial dominion) continue to be subject to be separately regu-

lated under O 70 only because of the peculiar nature of actions in rem and the nature of claims arising out of collisions as developed by the English Courts of Admiralty. Any apparent difference between an admiralty action in personam and an ordinary civil action is one of nomenclature. The difference is immaterial and it would still be immaterial even if the High Court were to have an admiralty division, which it does not. In any case, O 2 will cure any irregularity of this kind: see *'The O Sambaur' (No 1)*.[5] Accordingly, I hold that this court has jurisdiction in this action.

The second main argument of counsel for the defendants is that this court should decline jurisdiction on the ground that jurisdiction was obtained by an abuse of process. Counsel contends that there was an abuse of process as the cargo was brought to Singapore fraudulently and/or improperly in that the plaintiffs had refused to discharge it in any of the countries suggested by the defendants and had brought it to Singapore for no reason other than to found jurisdiction. Counsel has referred to the following authorities: *Stein* v *Valkenhuysen*,[6] *Watkins* v *North American Land & Timber Co Ltd*,[7] *Colt Industries Inc* v *Sarlie*,[8] and *Baldry* v *Jackson*.[9] As I have stated, the jurisdiction of an English court is based on the principle of territorial dominion. All persons within it 'owe their allegiance to its sovereign power and obedience to all its laws and to the lawful jurisdiction of its courts', correlative to which he is given protection by the state whilst within the territory for whatever length of time: per Lord Russell of Killowen in *Carrick* v *Hancock*[10] at p 60. However, an English court may decline jurisdiction if the way in which the defendant is brought within the jurisdiction is an abuse of process and it is an abuse if he is tricked or enticed to come within the jurisdiction for no reason other than to serve a writ on him, or 'in such circumstances falling short of fraud as would make it wrong for the court to try the action' (per Lyell J in *Colt Industries Inc* v *Sarlie*,[8] at p 676). Counsel's argument by way of analogy is that the plaintiffs improperly and unreasonably ordered the cargo to be discharged in Singapore for no reason other than to found jurisdiction and that this was an abuse of process.

Counsel for the plaintiffs contends (a) that once the court is seised of jurisdiction, it cannot refuse to exercise it, and (b) that the plaintiffs were fully justified in bringing the cargo to Singapore. As to (a), counsel relied on the statement of Murray-Aynsley CJ at p 296 in *Loke Wan Tho* v *Macdonald*:[11]

> There is no English doctrine which restricts the suitor in the choice of jurisdiction. The general rule still is where a court has jurisdiction it cannot refuse to exercise it: *Ewing* v *Orr Ewing* (1884) 9 AC 34.

Loke Wan Tho's case[11] concerned a duplicity of actions for damages for libel. The Chief Justice refused to stay the Singapore proceedings on the undertaking of the plaintiff to discontinue the English proceedings. This was a forum conveniens issue. *Orr*'s case[12] concerned an attempt by Scottish trustees to deprive the English court of jurisdiction by removing all the testator's assets in England to Scotland. The House of Lords held that the Chancery Court had jurisdiction and that it could not decline jurisdiction as there were no pending proceedings in Scotland. This was the converse of the present case. Neither decision is directly in point.

However, the argument of counsel for the plaintiffs is supported by Mohan Gopal in his article 'The Original Civil Jurisdiction of the Singapore High Court — Some Issues' [1983] 2 MLJ lxiv at p lxxi, where he argues that 'the common law 'inherent jurisdiction' does not survive the 1964 changes and that such unbridled [ie inherent] discretion cannot be possessed by a court whose jurisdiction itself is limited'. The argument is based on the reasoning that 'such inherent power is not compatible with limited jurisdiction', unlike in England where the jurisdiction is unlimited and therefore an English court has a discretion not to exercise jurisdiction in order that it may 'mitigate the breadth of its powers and to ensure that injustice will not arise from its sweeping assumption of power'.

I find it difficult to follow Mohan Gopal's argument. Section 16 is not concerned with jurisdiction in terms of subject matter, most of which is specified in s 17. Section 16 concerns jurisdictional basis. The principle applicable in England is also jurisdictional basis, only that the basis is territorial dominion. The defendant has to be within the territory, albeit casually, before the English court can exercise its powers against him. In principle, there should be no difference between bringing the defendant into the jurisdiction in order that jurisdiction be acquired against him and bringing the defendant's property into the jurisdiction in order that jurisdiction be acquired against the defendant. In both cases the process is the service, the former within and the other without the jurisdiction. In the former the abuse is the inducement of the defendant to come into the jurisdiction by fraudulent means, in the other it may be the fraudulent or deceptive way in which the property is brought within the jurisdiction. As the court is ultimately the master of its own process, it is arguable that the court's inherent jurisdiction to prevent injustice or to prevent an abuse of the process of court is not affected by s 16: see O 92 r 4 which preserves (or attempts to preserve) the court's inherent jurisdiction. However, I do not intend to decide this point as I have not heard full or adequate arguments on it.

Assuming however that the court has the power to strike out the action on the ground of abuse of process, I am far from satisfied on the materials before me that the conduct of the plaintiffs in discharging the cargo

was fraudulent or improper. The plaintiffs found themselves, willy nilly, in a position where their vessel was in a war zone, even though there was no declaration of war. Compliance with any of the requests of the defendants might have jeopardized the vessel or the cargo or both. It might also have resulted in criminal proceedings by the Panama government against the plaintiffs and the crew. Furthermore, the plaintiffs had a discretion under cl 16 of the bill of lading which provided as follows:

> 16 Government directions, War, Epidemics, ice, Strikes, etc.
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> (a) The Master and the Carrier shall have liberty to comply with any order or directions or recommendations in connection with the transport under this contract given by any Government or Authority, or anybody acting or purporting to act on behalf of such Government or Authority, or having under the terms of the insurance on the vessel the right to give such orders or directions or recommendations.
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> (b) Should it appear that the performance of the transport would expose the vessel or any goods on board to risk of seizure or damage or delay, resulting from war, warlike operations, blockade, riots, civil commotions or piracy, or any person on board to the risk of loss of life or freedom, or that any such risk has increased, the Master may discharge the cargo at port of loading or any other safe and convenient port.

The plaintiffs had their own interests to protect. Their action, in the circumstances, in preferring their own interests to that of the defendants is not, in my view, improper or fraudulent. As far as forum shopping is concerned, it is a perfectly respectable activity under English jurisprudence and has been viewed by Lord Denning, with a certain degree of pride, as a compliment to the preferred forum. In so far as port and other services were concerned in connection with the discharge and safe storage of the cargo, it is not disputed that Singapore offers good, efficient and cost effective protection for the cargo pending the disposal of the plaintiffs' actions against the defendants.

Having regard to the above circumstances, I find that the conduct of the plaintiffs was entirely reasonable.

Sale of the cargo

The defendants' application to set aside the order of court directing the sale of the cargo is based on the following grounds: (1) the application should not have been made ex parte; (2) the cargo is not perishable and its invoiced value (US$5,855,451.60) is far in excess of the highest bid price of ($5,456,000); (3) the burden of the plaintiffs in having to bear the costs of storage, insurance etc of the cargo pending the disposal of the action, does not give the court jurisdiction to order its sale as the expenses are incurred in the exercise of the plaintiffs' lien.

In my view, the first ground is no longer material on appeal as the defendants have their day in court. As regards the second ground, there is expert evidence adduced by the plaintiffs that part of the cargo can be stored for up to two years without any 'remarkable' deterioration of the contents. As for the market place, there is unchallenged affidavit evidence adduced by the plaintiffs that the market prices of bleached hard wood sulphate pulp and of unbleached kraft paper (UKP), which make up the cargo, have fallen between the first quarter and the fourth quarter of 1990. The cargo has been stored in Singapore since 21 August 1990. There is no offer by the defendants to provide security for the plaintiffs' claim. Expenses are being incurred at the rate of about $50,000 per month. The plaintiffs say that they have already incurred expenses in excess of $400,000 in storing and protecting the cargo. For these reasons, it must be prudent that the cargo be sold as soon as possible, assuming that the court has jurisdiction to order a sale. The defendants' complaint about the bid price can be met by having another public tender or auction, if the defendants so desire. But, they must then accept the risk of obtaining a lower price.

As regards jurisdictional point, counsel for the defendants submits that a party exercising a lien over the cargo has no claim against the owners thereof for expenses incurred in the exercise of the lien. The lien is a passive lien. He has referred to *The Thames Iron Works Co* v *The Patent Derrick Co*;[13] *Dangar* v *Gospel Oak Iron Oak Co*;[14] *Soames* v *British Empire Shipping Co*;[15] and *Bruce* v *Everson*.[16] The law is settled. 'At common law a legal lien merely conferred on the holder of the articles in respect of which it was claimed a passive right to detain the articles until the debt was paid. Such liens could not in the absence of statutory powers be enforced by sale although there might be expense incurred in the retention of the property. Accordingly, a person who chose to insist on his right of retainer might do so, but would have no further right and must put up with any inconvenience which the retention might entail' (28 *Halsbury's Laws of England* (4th Ed) para 542). The same passage goes on to say: 'However, the harshness of this rule is mitigated by the court's discretion to order the sale of perishable goods [under RSC O 29 r 4].' In *Dangar* v *Gospel Oak Iron Oak Co*,[14] the court refused to accept that it had no jurisdiction to order a sale of the goods and decided that it was a matter of discretion under the then O 50 r 2, but that 'the rule ought to be construed with a very tender regard to the persons in whom the legal property is vested' (per Denman J at p 261).

In my view, the common law rule is subject to O 29 r 4. The cargo falls within its terms as it is the subject matter (the lien) of the plaintiffs' claim for freight. This court has the power to order the sale of the cargo in

terms of that Rule. The question is whether it should exercise its discretion. Given the circumstances affecting the cargo, I do not believe that it can be less beneficial to the defendants that the cargo be sold as soon as possible rather than to let it accrue heavy storage and other charges whilst it is going through the natural process of deterioration pending the trial of this action. The circumstances are the refusal or inability of the defendants to provide security and also the current legal impossibility of the cargo being delivered to the defendants by virtue of the Prohibition of Imports And Exports (Iraq) Order 1990 made on 21 August 1990 under the Control of Imports and Exports Act (Cap 56, 1985 Ed). There is no evidence when this prohibition order will be annulled.

For the above reasons, the defendants' application is dismissed with costs.

Application dismissed.

Solicitors: *Haridass Ho & Partners; Drew & Napier.*

Reported by *David Chong Gek Sian*

'The Ocean Jade'; Owners of the Ship or Vessel 'Ocean Jade' v Owners of Cargo lately laden on board the Ship or Vessel 'Ocean Jade'

HIGH COURT (SINGAPORE) — ADMIRALTY IN REM NO 442 OF 1990
KARTHIGESU J
27 FEBRUARY 1991

Shipping and Navigation — Admiralty jurisdiction — Action in rem — Arrest of cargo to enforce shipowner's claim for freight — High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed), ss 3(1)(h) & 4(3) — Merchant Shipping Act (Cap 179, 1985 Ed), ss 263, 264, 266 & 267 — Rules of the Supreme Court 1970, O 41 r 5(1), (2), O 70 r 20(3) & (9)

Shipping and Navigation — Admiralty jurisdiction — Arrest of cargo to enforce shipowner's claim for freight — Vice-Admiralty Courts Act Amendment Act 1867 (30 & 31 Vict c 45), s 17 — Colonial Courts of Admiralty Act 1890 (53 & 54 Vict c 27) — High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed)

Civil Procedure — Admiralty — Jurisdiction — Arrest of cargo — Shipowner's claim for freight — Setting aside of writ and warrant of arrest

Civil Procedure — Admiralty — Jurisdiction — Arrest of cargo — Setting aside of default judgment — Rules of the Supreme Court 1970, O 41 r 5(1), (2), O 70 r 20(3) & (9)

Civil Procedure — Judgment in default of appearance — Affidavit filed as proof of plaintiffs' claim — Deponent of affidavit having no personal knowledge of facts and matters deposed — Rules of the Supreme Court 1970, O 41 r 5(1), (2), O 70 r 20(3) & (9)

The plaintiffs were owners of the vessel which had carried a cargo of wood pulp from a port in the United States to the Persian Gulf and thence to Singapore. The defendants were owners of a cargo of wood pulp carried under bills of lading on board the plaintiffs' vessel. At the time when the cargo of wood pulp was loaded on board the plaintiffs' vessel, the vessel was time chartered to Meridien Shipping Incorporated. The cargo of wood pulp was to be delivered to the defendants at the Iraqi port of Um Qaser or Basrah. After the time charterer ran into financial difficulties and repudiated the charterparty, the plaintiffs took over the running of the vessel including the contracts of carriage entered into by the vessel during the currency of the charterparty.

As the vessel was about to proceed to discharge the defendants' cargo at Um Qaser/Basrah, Iraq invaded Kuwait. Imposition of economic sanctions against Iraq made it difficult for the plaintiffs' vessel to proceed to any Iraqi port. After making inquiries in 14 countries as to the possible discharge of the cargo of wood pulp in those countries, the plaintiffs carried the cargo to Singapore. At Singapore, the cargo was discharged into a warehouse and thereafter, the plaintiffs commenced an action in rem to enforce their claim for freight, extra expenses and return freight arising from the carriage and on-carriage of the cargo of wood pulp to Singapore. The plaintiffs caused the cargo of wood pulp to be arrested in the action. Thereafter, the plaintiffs obtained an order for the appraisal and sale of the cargo *pendente lite* and also obtained judgment in default of appearance in the admiralty action in rem.